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The State of New Hampshire

Department of Environmental Services
Water Council

In Re: Application of USA Springs, Inc. for a Large Groundwater Withdrawal Permit and Approval of Bottled Water Source

Docket No. 04-15 WC

SELECTMEN OF THE TOWN OF NOTTINGHAM'S MOTION FOR REHEARING

The Town of Nottingham Selectmen ("Nottingham") hereby move the Water Council to grant rehearing of Petitioner's Appeal of the Decision of the Department of Environmental Services Water Division (the "Department") to grant a large groundwater withdrawal permit to USA Springs, Inc.

A. BASIS FOR REHEARING

1. Nottingham requests a rehearing as the Decision is unlawful and unreasonable because the Department erroneously interpreted the statutory appeals procedure pursuant to RSA 21-O, RSA 485-C:21, and RSA 541, and relied on an opinion letter of the Office of the Attorney General which incorrectly evaluated the issue.

2. Nottingham does not seek to introduce new evidence as the rehearing may be granted on the findings of the Decision itself and the arguments presented herein.

3. Nottingham requests that the Department rehear the issue of whether to accept Nottingham's Appeal and reverse its decision declining to accept the appeal.

B. PROCEDURAL BACKGROUND

4. The Department granted a large groundwater withdrawal permit to USA Springs, Inc. on July 1, 2004. Nottingham timely filed a Notice of Appeal to the Water Council under RSA 21-O:7 dated July 30, 2004.

5. Nottingham's Notice of Appeal attached its request for rehearing to DES dated July 30, 2004, which set forth all of the grounds upon which Nottingham believed the DES Water Division decision was unlawful and unreasonable. Nottingham asked that the Water Council find the DES decision to be unlawful and unreasonable based upon the grounds presented in that request for rehearing.

6. The Council issued its Decision and Order Declining to Accept Appeal on January 13, 2005 (the "Decision"). The Decision states that the Council determined that an appeal from the approval or denial of a large groundwater permit is pursuant to RSA 541 through a motion for rehearing to DES and then an appeal to the New Hampshire Supreme Court.

C. ARGUMENT

i. This issue involves matters of statutory interpretation.

7. Statutes are to be interpreted in the context of the overall statutory scheme and not in isolation. GCP Steeplegate, Inc. v. City of Concord, 150 N.H. 683 (2004). The goal is to apply statutes in light of the legislature's intent in enacting them and in light of the policy sought to be advanced by the entire statutory scheme. Id.

8. When interpreting two statutes which deal with a similar subject matter, they should be construed so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute. In re New Hampshire Public Utilities Commission Statewide Electric Utility Restructuring Plan, 143 N.H. 233, 240 (1998). The statutes should be construed as consistent with each other where reasonably possible. Id.

ii. **Large groundwater permits should be appealed to the Water Council.**

(a) RSA 21-O establishes a mandatory review of Water Division decisions by the Water Council.

9. Under the provisions of RSA 21-O:7,

> "The Water Council shall hear and decide all appeals from department decisions relative to the functions and responsibilities of the division of water other than department decisions made under RSA 482-A relative to wetlands, in accordance with RSA 21-O:14."

10. Under RSA 21-O:14, hearings before the Water Council shall be conducted in accordance with the provisions of RSA 541-A, governing adjudicative proceedings. Appeals from decisions of the Water Council are in accordance with the provisions of RSA 541.

11. The review of applications for large groundwater withdrawals is a function and responsibility of the division of water. Thus, the provisions of RSA 21-O:7 mandate that the Water Council hear this appeal.

12. The conduct of an adjudicative proceeding before the Water Council under RSA 21-O:7 is consistent with the provisions of RSA 485-C:21 and regulation of the Department which provides that appeals from decisions on large groundwater withdrawal permit applications are to be conducted in accordance with RSA 541. Following the decision of the Water Council, an aggrieved party may appeal under the provisions of RSA 541 to the New Hampshire Supreme Court.

13. RSA 21-O establishes a comprehensive appeals structure to ensure that all decisions from various DES divisions are reviewed by an independent appeal board with the opportunity for adjudicative hearing (although wetlands decisions are specifically excepted from the adjudicative hearing process). Dismissal of Nottingham's appeal by the Water Council is contrary to the appeal structure established by law under RSA 21-O.

(b) The legislative intent supports appeals to the Water Council.

14. The two statutes (RSA 485-C:21 and RSA 21-O:7) appear on the surface to suggest contrary appeals for parties thus creating ambiguity regarding the meaning and intent of the statutes. The statutes are not plain and unambiguous and it is proper to look to both the legislative intent and the objectives of the legislation. See Greenhalge v. Town of Dunbarton, 122 N.H. 1038, 1040 (1982).

15. RSA 481:1 demonstrates the New Hampshire Legislature's deep concern about the stewardship of the valuable and limited groundwater resource of New Hampshire. The Water Council's decision, which concludes that the Water Council does not have jurisdiction to review large groundwater withdrawal decisions, is contrary to the Legislative intent and means that these important matters will not receive the independent review intended by law under RSA 21-O.

(c) The Water Council's reliance on the interpretation of RSA 483-B provided by the Office of the Attorney General is unlawful and unreasonable.

16. The Water Council also unlawfully and unreasonably relied upon the advice of the Office of the Attorney General (which had also moved to dismiss the appeal) through a letter dated September 2, 2004 from Senior Assistant Attorney General Jennifer Patterson to Michael P. Nolin, Commissioner of DES (attached as Exhibit A).

17. The letter relates to an interpretation of RSA 483-B, the Comprehensive Shoreland Protection Act, and the obligations of DES when issuing other environmental permits that also fall within the Act.

18. Regarding the appeal route for DES permitting decisions issued under the Shoreland Protection Act, the letter provides that when the agency is undertaking enforcement action under the Act itself, the appeal would be to the Water Council for administrative orders,

and to the New Hampshire Supreme Court for administrative fines. The letter also provides that any administrative appeal of a permitting decision is governed by the procedure specified in the statute under which the underlying permit was granted. *Opinion of the Attorney General*, pg. 4.

19. Nothing in that letter, (which with due respect is simply guidance of one attorney in the Attorney General's Office) mandates dismissal of Nottingham's appeal from the decision of the DES Water Division. In fact, principles of statutory construction and interpretation of the relationship between RSA 21-O and RSA 541 dictate that the Water Council accept this appeal and conduct an adjudicative hearing in accordance with its responsibility under RSA 21-O:14. Appeal from a decision based upon an adjudicative hearing is to the Supreme Court in accordance with the provisions of RSA 541.

D. CONCLUSION

20. The Town of Nottingham Selectmen request that the Water Council grant rehearing of the Petitioner's Appeal. The two statutes (RSA 485-C:21 and RSA 21-O:7) can and should be read in a way that gives effect to both statutes. That reading dictates that the Water Council must take jurisdiction of this appeal, and conduct an adjudicative hearing under the provision of RSA 21-O:14. Appeal to the Supreme Court under RSA 541 would follow, if necessary.

Respectfully submitted,
TOWN OF NOTTINGHAM SELECTMEN

By its attorneys,
Nelson, Kinder, Mosseau & Saturley, P.C.

Dated: February 8, 2005

E. Tupper Kinder, Esquire
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, first class, and postage prepaid Mark Beliveau, Esquire, Armand Hyatt, Bill McCann, S.O.G., Assistant Attorney General Richard Head, and Assistant Attorney General Anna M. Edwards, Esquire.

Dated: February 8, 2005

Kristin M. Yasenka, Esquire

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ATTORNEY GENERAL
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KELLY A. AYOTTE
ATTORNEY GENERAL

September 2, 2004

Michael P. Nolin, Commissioner
Department of Environmental Services
29 Hazen Drive
Concord, New Hampshire 03301

Dear Commissioner Nolin:

This responds to your request for clarification of several issues involving the interaction between the Shoreland Protection Act and other state and municipal regulatory programs. Specifically, you inquired about the obligations of the Department of Environmental Services ("DES") under the Act when issuing other environmental permits, and the circumstances under which a local shoreland ordinance, rather than the Act, applies to a particular project.

I. THE SHORELAND PROTECTION ACT REQUIRES THE DEPARTMENT OF ENVIRONMENTAL SERVICES, IN PERMITTING A PROJECT WITHIN THE PROTECTED SHORELAND THAT FALLS UNDER SEPARATE PERMIT JURISDICTION OF THE AGENCY, ALSO TO ASSESS WHETHER THE APPLICANT'S PROPOSAL MEETS THE MINIMUM SHORELAND PROTECTION DEVELOPMENT STANDARDS.

The Comprehensive Shoreland Protection Act, RSA Chapter 483-B ("the Act"), originally enacted in 1991, functions statewide as an additional layer of regulation which overlays existing state and municipal permitting schemes, such as building permits, wetlands permits, and septic system approvals. 1991 N.H. Laws 303:1. Aimed at protecting the state's public waters and preventing "uncoordinated, unplanned and piecemeal development along the state's shorelines," the Act establishes generally applicable minimum standards for development within the protected shoreland. RSA 483-B:1 (Purpose); RSA 483-B:9 (Minimum Standards).[1] In keeping with its "comprehensive" nature, the Act applies to all state and local permitting decisions which might affect the development of waterfront property. RSA 483-B:3, I ("State and local permits for work within the protected shorelands

[1] The Act applies to land within 250 feet of the "reference line" or high water mark. RSA 483-B:4, XV (definition of "protected shoreland"), XVII (definition of "reference line").

shall be issued only when consistent with the policies of this chapter"). DES has authority to enforce the Act, as do municipalities in which protected shoreland is situated. RSA 483-B:5 (DES); RSA 483-B:8, III (municipalities).

The Act does not contain its own separate permit requirement.[2] Rather, its standards are designed to "piggy-back" on existing state and local permit proceedings. RSA 483-B:3, I & II; RSA 483-B:6; RSA 483-B:14 (rehearings and appeals). Section 6 of the Act defines the DES role in issuing permits for work within the protected shoreland:

> I. Within the protected shoreland, any person intending to:
> (a) Engage in any earth excavation activity shall obtain all necessary local approvals in compliance with RSA 155-E.
> (b) Construct a water-dependent structure, alter the bank, or construct or replenish a beach shall obtain approval and all necessary permits pursuant to RSA 482-A.
> (c) Install a septic system as described in RSA 483-B:9, V(b)(1)-(3) shall obtain all permits pursuant to RSA 485-A:29.
> (d) Conduct an activity resulting in a contiguous disturbed area exceeding 50,000 square feet shall obtain a permit pursuant to RSA 485-A:17.
> (e) Subdivide land as described in RSA 483-B:9, V(d) and (e) shall obtain approval pursuant to RSA 485-A:29.
>
> II. In applying for those approvals and permits, such persons shall demonstrate to the satisfaction of the department that the proposal meets or exceeds the development standards of this chapter. The department shall grant, deny, or attach reasonable conditions to a permit listed in subparagraphs I(a)-(e), to protect the public waters or the public health, safety or welfare. Such conditions shall be related to the purposes of this chapter.

RSA 483-B:6 (Supp. 2003). In programs that predate the Act, DES has regulatory authority over the permits listed in RSA 483-B:6, I(b) – (e). RSA 482-A:3 (wetlands permit); RSA 485-A:17 (terrain alteration); RSA 485-A:29 (septic system and subdivision approval).

The well-established principles of statutory interpretation hold that statutes must be interpreted based on their plain language, focusing on the statute as a whole, not on isolated words or phrases. Transmedia Restaurant Co., Inc. v. Devereaux, 149 N.H. 454, 462 (2003). When the language used in a statute is clear and unambiguous, there is no need to examine the provision's legislative history. Merrill v. Great Bay Disposal Serv., 125 N.H. 540, 542;

[2] As originally enacted, the Act required that "[e]ach person intending to construct a new or expanded structure within the protected shoreland, . . . or any other activity which will alter the existing character of the protected shoreland, shall seek a shoreland development permit" from DES. 1991 N.H. Laws 303:1; RSA 483-B:6 (1992 Bound Volume). However, in 1992 the permit requirement was eliminated, and section 6 of the Act was adopted in substantially its present form. 1992 N.H. Laws 235:10.

(1984). "A widely accepted method of statutory construction is to read and examine the text of the statute and draw inferences concerning its meaning from its composition and structure." Id., quoting State v. Flynn, 123 N.H. 457, 462 (1983).

Under the plain language of the Act, when an application for a DES permit triggers shoreland review under section 6, DES must proceed with its ordinary permitting process, but must also consider whether the proposal meets the minimum shoreland standards. These standards, contained in RSA 483-B:9, require (among other things) that primary structures be set back behind the primary building line,[3] prohibit certain activities and substances within the protected shoreland,[4] and establish specific requirements with respect to maintenance of a natural woodland buffer,[5] septic systems,[6] and prevention of erosion and siltation.[7] If DES is not satisfied that the proposal meets the minimum standards of the Act, the agency must deny the application. RSA 483-B:6, II.

After careful review, we conclude that the agency's current practice should be modified so as to better comply with the Act. Prior to issuing a permit, DES must be satisfied that the proposal meets the Act's minimum standards. RSA 483-B:6, II. Currently, DES has no formal mechanism for reviewing plans for a proposal's shoreland impacts, taken separately from the standard permit requirements under other regulatory statutes. The shoreland rules require applicants for the permits listed in RSA 483-B:6, I to certify that their projects meet the minimum shoreland standards. N.H. Code of Admin. Rules, PART Env-Ws 1409. Consistent with this rule, the DES practice has been to rely on a combination of the applicant's certification and a permit condition requiring compliance with the Act.

Relying on the applicant's certification and the prospect of enforcement action for noncompliance is not sufficient to demonstrate "satisfaction." Instead, when issuing an environmental permit for a project located within the protected shoreland, DES must make affirmative findings showing the proposal's consistency with the minimum standards of the Act. To provide a basis for these findings, the staff must request that the applicant provide information sufficient to demonstrate that the minimum standards are satisfied. Then, in issuing or denying the permit, the agency must make findings to support its conclusion, and condition the permit on compliance with any plans, specifications or techniques necessary to ensure that the project conforms with the minimum standards.

For example, the DES wetlands program might receive an application under RSA 482-A:3 for a boathouse from a property owner who also intends as part of the same

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[3] RSA 483-B:9, II(b).
[4] The Act prohibits salt storage yards, automobile junk yards and solid or hazardous waste facilities, as well as the use of fertilizer within 25 feet of the reference line. RSA 483-B:9, II(g) and (d).
[5] RSA 483-B:9, V(a).
[6] RSA 483-B:9, V(b).
[7] RSA 483-B:9, V(c). In addition, the Act contains other minimum standards concerning lot size, public utilities, and existing waste facilities. RSA 483-B:9, V(d-f).

"project" to construct or modify other structures within the protected shoreland.[8] Under these circumstances, DES should review not only the boathouse plans, but also the plans for the other aspects of the project. To ensure that DES receives the necessary information from the applicant, I recommend that the standard application forms be modified to include a question about whether additional work in the protected shoreland is planned as part of the same project. For applicants who answer in the affirmative, there should be an additional form in which they must provide details about those aspects of the project. The application should not be considered complete until the applicant has provided this information.[9] Some projects may require multiple DES permits (for example, both wetlands and site specific). For such projects, there should be internal coordination within the agency to ensure that the shoreland review is only performed once, and is incorporated into each permit issued.

You also asked about the appropriate appeal route for DES permitting decisions under section 6 of the Act. The Act specifically addresses this issue:

> *Where the requirements of this chapter amend the existing statutory authority of the department* or other agencies relative to certain established regulatory programs and shall be enforced under these established regulatory programs, *the existing procedures governing* contested cases and hearings and *appeals* regarding these requirements *shall apply*. Where requirements of this chapter are new and do not amend existing statutory authority relative to any established regulatory programs, the procedures set forth in RSA 541-A:31 for contested cases shall apply.

RSA 483-B:14 (emphasis added). Thus, any administrative appeal of a permitting decision is governed by the procedure specified in the statute under which the underlying permit was granted. See generally RSA 21-O:14, governing administrative appeals from DES decisions. For wetlands permits, appeal should be to the Wetlands Council (see RSA 482-A:10 and RSA 21-O:5-a); for subsurface and site specific permits, appeal should be to the Water Council (see RSA 21-O:7). Where the agency is undertaking enforcement action under the Act itself, appeal would be to the Water Council for administrative orders, and to the New Hampshire Supreme Court under RSA ch. 541 for administrative fines. RSA 21-O:7, IV; RSA 483-B:5, V (administrative orders); RSA 483-B:18, III(c)(administrative fines).

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[8] The Act says "proposal," not "project." RSA 483-B:6, II. However, given the subject matter and broad applicability of the Act, we conclude that the word "proposal" as used in RSA 483-B:6, II should be read broadly to include all work contemplated by the applicant as an integrated project on the property within the protected shoreland at the time the application for the DES permit is submitted. A narrower reading would confine the DES review to the criteria in effect prior to the Act, and undermine the Act's purpose.

[9] This is important for programs with statutory deadlines for acting on complete applications. See, e.g., RSA 482-A:3, XIV (Supp. 2003)(DES must complete review of wetlands application within set number of days of notice of administrative completeness, or application will be deemed granted).

II. A MUNICIPAL ORDINANCE CAN APPLY INSTEAD OF THE SHORELAND PROTECTION ACT ONLY AFTER THE OFFICE OF ENERGY AND PLANNING HAS CERTIFIED TO THE DEPARTMENT OF ENVIRONMENTAL SERVICES THAT THE LOCAL ORDINANCE IS AT LEAST AS STRINGENT AS THE ACT.

Your second question concerns the circumstances under which a municipal shoreland ordinance applies instead of the standards in the Act. We conclude that a municipal ordinance can render the Act wholly inapplicable, but only when that ordinance has been certified by the Office of Energy and Planning ("OEP") as being equally stringent to the Act. However, with respect to primary building setbacks only, a setback less than fifty feet may apply in a municipality that adopted the setback prior to January 1, 2002.

Shoreland property is exempt from the Act if it is located in a municipality whose local shoreland ordinance has been certified by OEP. Specifically, the Act provides as follows:

> I. Subject to paragraph II, the provisions of this chapter shall not apply to any applicant whose land is in a municipality that has adopted a shoreland protection ordinance under RSA 674:16, the provisions of which are at least as stringent as similar provisions in this chapter. The director of the office of energy and planning shall certify to the commissioner that the provisions of a local ordinance are at least as stringent as similar provisions in this chapter.
>
> II. If a municipality has a local ordinance that does not contain a counterpart to all of the provisions of this chapter, the more stringent provisions shall apply.

RSA 483-B:19 (Supp. 2003 and 2004 N.H. Laws 257:44). While paragraph II was added in 2002,[10] the requirement of OEP certification has remained unchanged since the Act took effect in 1994.[11]

In order for a municipality to qualify for the exemption, the plain language of section 19 requires not only that the local ordinance be as strict as the Act, but also that OEP so certify to DES. If the exemption could take effect without OEP certification, the language requiring certification would be impermissibly superfluous. Merrill v. Great Bay Disposal

[10] 2002 N.H. Laws 263:12.

[11] The original 1991 version of the law provided that the Act would not apply in any municipality that had adopted a draft model ordinance provided by the office of state planning, the predecessor to OEP. See 1991 N.H. Laws 303:1; RSA 483-B:19 (1992 Bound Volume). However, the certification requirement, in substantially its current form, was substituted prior to the law taking effect in 1994. RSA 483-B:19 (2001 Bound Volume); 1994 N.H. Laws 383:20. The provision has also been amended several times, most recently in 2004, to reflect changes in the name of the agency performing the certification. 2003 N.H. Laws 319:9; 2004 N.H. Laws 257:44.

Serv., 125 N.H. 540, 543 (1984)(all words of statute must be given effect; legislature not presumed to use superfluous words). Requiring an affirmative certification by OEP is also consistent with the clear legislative intent that the Act be comprehensive in its application, and that its standards apply to all state and local permits. See RSA 483-B:3 (requiring all state and local permits to be consistent with the Act).

The primary building setback is the only provision of the Act which may vary among municipalities, without OEP certification. Prior to a 2002 amendment, a municipality could establish its own primary building setback, whether lesser or greater than the figure of fifty feet established under the Act. RSA 483-B:9, II (2001 Bound Volume). Under an amendment to the Act which took effect on July 2, 2002, the primary building line is established absolutely at "50 feet from the reference line." 2002 N.H. Laws 114:1, RSA 483-B:9, II (Supp. 2003). Nevertheless, the general court expressly allowed municipalities which had, prior to January 1, 2002, established a setback of less than fifty feet, to maintain that different setback. 2002 N.H. Laws 114:1. Thus, while an uncertified ordinance cannot supplant the Act, certain municipalities whose ordinances have not been certified by OEP may nevertheless have a primary building setback which varies from that established under the Act. Even in those municipalities with different setbacks, however, all other provisions of the Act apply.

In sum, the standards of the Act apply to all state and local permitting decisions, unless the local ordinance has been properly certified by OEP. Both the state and municipalities have authority to enforce the Act; it is worth noting that violations include not only construction that fails to conform with the minimum standards, but also issuance of a permit that is not consistent with the policies of the Act. RSA 483-B:3, I.

I trust this responds to your inquiry. Given the previous uncertainty on the interpretation of these provisions, both within the agency and in the community at large, I recommend that DES undertake outreach consistent with this opinion to ensure affected entities are aware of the Act's requirements.

Very truly yours,

COPY COPY

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JJP:mtn
OPN-04-0002
cc: MaryAnn Manoogian, Director, OEP